AMINNUDIN REZAL JAAFAR & ORS v. PREMA BONANZA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON JC
[SUIT NO: WA-22NCVC-464-08-2020]
12 NOVEMBER 2021

Abstract – *The Housing Development (Control and Licensing) Act 1966 and the Housing Development (Control and Licensing) Regulations 1989 are social legislations enacted with the purpose of protecting house buyers, and to that end, any purported settlement which diminishes or takes away the statutory rights of house buyers will have no legal effect. A housing developer cannot rely on any waiver or estoppel to preclude a house buyer from asserting the full extent of his rights as provided under the Act 1966 or the Regulations; allowing such waiver or estoppel to be operative against the buyer would defeat the object of those statutes.*

CIVIL PROCEDURE: *Summary judgment – Application for – Claim for compensation in respect of liquidated ascertained damages – Late delivery of vacant possession of property and late completion of common facilities – Whether there were triable issues – Rules of Court 2012, O. 14*

LAND LAW: *Vacant possession – Late delivery – Claim for compensation in respect of liquidated ascertained damages – Whether claimants had knowledge and consented to sale and purchase agreements – Whether claimants employed correct mode of proceedings – Whether claimants estopped by settlement letters – Whether there would be unjust enrichment – Whether action barred by limitation – Whether actual loss or damage needed to be particularised and shown – Whether there was non-joinder of parties*

The plaintiffs were purchasers and/or parcel owners of the residential suit in a housing project ('project') while the defendant was the developer of the said project. The sale and purchase agreements ('SPA') signed between the parties were in the prescribed statutory form under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations'), which provided that vacant possession of the property and the common facilities shall be delivered within 36 months from the date of the SPA. The defendant had obtained an extension of time ('EOT') for the completion period of the project from 36 months to 54 months ('EOT period'). The EOT was obtained on 16 December 2010, before the SPA was entered into. As such, cls. 25 and 27 of the SPA reflected the 54 months EOT period. On various dates in January 2017, the defendant issued the notice of delivery of vacant possession to the plaintiffs, giving 14 days' notice from the date of the said notice, of delivery of vacant possession of the property. The

plaintiffs claimed that (i) the variation of the time period for delivery of vacant possession of the property, from 36 months to 54 months, in the SPA was void as such deviation of the prescribed statutory form SPA in Schedule H contravened the Housing Development (Control and Licensing) Act 1966 ('Act') and the Regulations; and (ii) vacant possession was delivered late; it ought to have been delivered on or before the date which was 36 months from the date of the respective SPA. As such, the defendant was liable to pay liquidated ascertained damages ('LAD') for late delivery of vacant possession of the property. According to the plaintiffs, the defendant did not compensate the plaintiffs in respect of the LAD for late delivery of vacant possession of the property and late completion of common facilities for the period commencing from the expiry of 36 months after the payment of the booking fee. Relying on the decision of the Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* ('*PJD Regency*'), the plaintiffs submitted that the completion period was to be calculated on a period of 36 months, commencing from the date of payment of the booking fee where applicable. The plaintiffs applied for summary judgment against the defendant, pursuant to O. 14 of the Rules of Court 2012 ('ROC') ('encl. 47'). Objecting to encl. 47, the defendant argued that the plaintiffs (i) had knowledge and consented to the SPA; (ii) employed the wrong mode of proceedings. The plaintiffs were challenging the validity of the EOT, which was a decision granted by the Ministry, and therefore within the sphere of public law. Thus, the plaintiffs' action must be by way of judicial review under O. 53 of the ROC and not a writ action; (iii) estopped by settlement letters; (iv) would be unjustly enriched; (v) were barred by s. 8 of the Limitation Act 1953; (vi) failed to particularise and show actual loss or damage; and (vii) wrongly filed a class action. The defendant further added that there had been a non-joinder of parties as the plaintiffs failed to join the Minister of Housing and Local Government and the Housing Controller ('Ministry') because the present action sought a declaration that the EOT granted by the Ministry was null and void.

Held (allowing encl. 47):

(1) The SPA signed between the parties was in the prescribed Schedule H contract of sale. As the SPA was regulated by statute, the defendant could not deviate, add or vary any of the terms in the said statutory contract. The SPA must follow the prescribed form in Schedule H which provides a completion period of 36 months. The defendant was not permitted to change the completion period from 36 months to 54 months. Any variation made to the SPA, which was inconsistent or in contradiction with the terms in the Schedule H contract of sale was of no legal effect and did not bind the plaintiffs. The defendant was required to deliver vacant possession of the property within 36 months, not 54 months, in accordance with Schedule H. (paras 18, 22 & 23)

(2) It made no difference that the EOT was obtained before the signing of the SPA or that the plaintiffs ought to have knowledge of the 54 months of the EOT period. The outcome remained the same; the EOT was unlawful and one could not waive or consent to illegality. (para 27)

(3) Since the EOT was illegal and *void ab initio*, there was no decision to challenge. The fact that the plaintiffs did not quash the EOT by way of judicial review did not make the EOT legal and valid. The effect of the EOT being void was that there was no decision in the first place. Thus there was nothing to challenge. The reliefs sought by the plaintiffs were derived from the SPA. The defendant was directly responsible for the infringement of the plaintiffs' rights and was liable to provide monetary relief of LAD. This fell under private law. (para 36)

(4) The settlement letters were confined to LAD calculated from the EOT period of 54 months onwards. The plaintiffs' claim for LAD, however, was based on a completion period of 36 months. There was no duplicity of LAD claim by the plaintiffs. The defendant had never denied that it did not pay the plaintiffs any LAD in respect of the 54 months EOT period. As such, this was not a situation where the plaintiffs would receive double compensation of LAD pertaining to the same period. In light of *PJD Regency*, the LAD was to be calculated commencing from the date of payment of the booking fee. (paras 44-46)

(5) There was no issue of unjust enrichment, waiver or estoppel as the Act and the Regulations were social legislations enacted to protect house buyers. Neither unjust enrichment nor waiver nor estoppel could be relied upon by the defendant to prevent the plaintiffs from claiming what they were statutorily entitled to claim premised on the prescribed Schedule H contract of sale. Otherwise, the intent of Parliament to protect house buyers would be defeated. (para 60)

(6) The plaintiffs' right to claim for LAD only arose on the date they took delivery of vacant possession of the property; if the defendants failed to deliver vacant possession, which was not the case here, then on the date the delivery of vacant possession fell due. This was because that was the time when the defendant must pay the LAD, if any. This was stipulated in cl. 25(2) of the SPA. The plaintiffs took, or were deemed to have taken delivery of vacant possession of the property on various dates in early 2017 *ie*, January or February 2017. Thus, the plaintiffs' cause of action to claim for LAD accrued on those dates. The six years limitation period would only expire in early 2023 *ie*, January or February 2021. The present suit was filed on 10 August 2020 which was well within the limitation period. The plaintiffs' claim was not barred by limitation. (paras 65 & 67)

(7) The formula for the calculation of the LAD was set out in cls. 25(2) and 27(2) of the SPA. The LAD formula in the SPA was prescribed by law. The plaintiffs' claim for LAD was in accordance with the prescribed law. There was no further onus on the plaintiffs' to prove damages. (paras 72 & 76)

(8) The plaintiffs' SPA bore the same terms and conditions as each other except for the purchase price, unit number and the date of the SPA. The reliefs claimed by each of them were in respect of a similar transaction. The issues that existed in their respective claims arose from the same question of law. Therefore, their respective claims could be expediently dealt with in the same proceeding. There was no abuse of process. (para 79)

(9) The instant suit challenged the validity of cls. 25 and 27 of the SPA rather than the decision of the Ministry in granting the EOT. It was the contractual breach of cls. 25 and 27 of the SPA which gave rise to the defendant's obligation to pay LAD for failing to deliver the vacant possession as prescribed under the law, as opposed to the administrative decision of the Ministry. It was not necessary for the plaintiffs to join the Ministry as a party to this suit. (para 34)

Case(s) referred to:

Abillah Labo Khan v. PP [2002] 3 CLJ 521 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(foll)***

Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors [1985] 2 CLJ 11; [1985] CLJ (Rep) 37 SC ***(foll)***

Chan Kwai Chun v. Lembaga Kelayakan [2002] 3 CLJ 231 CA ***(refd)***

Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(foll)***

Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor [2016] 1 CLJ 893 CA ***(foll)***

Hedgeford Sdn Bhd v. Sri Gananatha Sivanathan & Ors [2018] 1 LNS 1497 HC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(foll)***

Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor [2015] 2 CLJ 252 CA ***(foll)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(foll)***

PhilleoAllied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [1999] 2 CLJ 1023 CA ***(refd)***

Powernet Industries Sdn Bhd v. Golden Wheel Credit Sdn Bhd [2020] 10 CLJ 374 CA ***(refd)***

Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(not foll)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(foll)***

Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor [2020] 5 CLJ 619 CA ***(refd)***

Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 8 CLJ 163 FC ***(refd)***

Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 75

Housing Development (Control and Licensing) Regulations 1989, reg. 11(2), (3), Schedule H

Limitation Act 1953, s. 6(1)(a)

Rules of Court 2012, O. 6 r. 2(1)(b), O. 14, O. 15 rr. 4, 12, O. 18 r. 12, O. 53 r. 3(6)

For the plaintiffs - Jadadish Chandra; M/s Arbain & Co

For the defendant - Lai Chee Hoe & Chua Heaw Eng; M/s Chee Hoe & Assocs

Reported by Najib Tamby

JUDGMENT

Quay Chew Soon JC:

Introduction

[1] The plaintiffs filed an application *vide* encl. 47 ("encl. 47") for summary judgment against the defendant ("D"). Enclosure 47 is made under O. 14 of the Rules of Court 2012 ("ROC"). I allowed encl. 47 and entered summary judgment against D. These are the grounds of my decision.

Background

[2] The plaintiffs are purchasers and/or parcel owners of residential units ("property") in a housing project known as 'The Central Residences' ("housing project"). D is the developer of the housing project.

[3] By way of separate sale and purchase agreements ("SPA") entered into on various dates in 2012 and 2013, the plaintiffs purchased the property. The respective unit or parcel of the plaintiffs is set out in columns A and B of the annexures attached to the statement of claim ("SOC annexures"). The respective date and price under the SPA are set out in column D of the SOC annexures.

[4] Prior to the execution of the SPA, some of the plaintiffs paid a commitment sum ("booking fee") of RM10,000 and the 19th and 20th plaintiffs paid a booking fee amounting to RM101,000 to D. The date of payment of the booking fee is set out in column C of the SOC annexures.

[5] The SPA signed between the parties was in the prescribed statutory form under Schedule H ("Schedule H") of the Housing Development (Control and Licensing) Regulations 1989 ("HDR"). The Schedule H contract of sale provides that vacant possession of the property and the common facilities shall be delivered within 36 months from the date of the SPA.

[6] D, however, had obtained an extension of time ("EOT") for the completion period of the housing project from 36 months to 54 months ("EOT period"). The EOT was obtained on 16 December 2010, ie, before the SPA was entered into. As such, the SPA signed between the parties reflected the 54 months EOT period in cls. 25 and 27 thereof.

[7] Under cl. 25(2) of Schedule H, the liquidated ascertained damages ("LAD") for late delivery of vacant possession of the property shall be calculated at the rate of 10% per annum on the purchase price, from the due date for delivery of vacant possession until the date the purchaser takes vacant possession. Under cl. 27(2) of Schedule H, the LAD for late completion of the common facilities shall be calculated at the rate of 10% per annum on the last 20% of the purchase price.

[8] On various dates in January 2017, D issued the notice of delivery of vacant possession to the plaintiffs, giving 14 days' notice from the date of the said notice, of delivery of vacant possession of the property. By virtue of cl. 26(3) of the SPA, the plaintiffs are deemed to have taken delivery of vacant possession of the property at the expiry of 14 days after the said notice. The date of delivery of vacant possession in respect of each plaintiff is set out in column E of the SOC annexures.

Plaintiffs' Case

[9] The plaintiffs aver that the variation of the time period for delivery of vacant possession of the property from 36 months to 54 months in the SPA is void. By reason that such deviation of the prescribed statutory form sale and purchase agreement in Schedule H contravenes the Housing Development (Control and Licensing) Act 1966 ("HDA") and the HDR. The plaintiffs rely on the decision of the Federal Court delivered on 26 November 2019 in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281; [2019] 6 MLRA 494 ("*Ang Ming Lee*").

[10] Premised on the completion period of 36 months as stipulated in the Schedule H contract of sale, the plaintiffs aver that vacant possession of the property was delivered late. Vacant possession ought to have been delivered

on or before the date which is 36 months from the date of the respective SPA. As such, the plaintiffs aver that D is liable to pay LAD for late delivery of vacant possession of the property.

[11] D had paid some of the plaintiffs' LAD (said to be pursuant to cl. 25(2) of the SPA) for late delivery of vacant possession of the property. The respective amounts of the said payments are set out in column F of the SOC annexures. Save for such plaintiffs who received the said payments, the other plaintiffs were not paid or had refused the said offer of LAD.

[12] Whilst some of the plaintiffs were paid LAD as compensation for the period commencing from the expiry of 54 months after the date of their respective SPA to the delivery of vacant possession of the property, D did not compensate the plaintiffs in respect of LAD for late delivery of vacant possession of the property and late completion of common facilities for the period commencing from the expiry of 36 months after the payment of the booking fee. This forms the basis of the plaintiffs' claim herein.

[13] Relying on the decision of the Federal Court delivered on 19 January 2021 in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441, [2021] 2 MLJ 60, the plaintiffs' claim is on the basis that the completion period is to be calculated on a period of 36 months commencing from the date of payment of the booking fee, where applicable.

[14] In the statement of claim and in encl. 47, the plaintiffs prayed for the following:

(i) a declaration that cl. 25(1) of the SPA stating delivery period of vacant possession is 54 months from the date of the SPA is invalid, unlawful or null and void whereby it contravenes reg. 11 and cl. 25(1) of Schedule H;

(ii) a declaration that cl. 27(1) of the SPA stating completion period of common facilities is 54 months from the date of the SPA is invalid, unlawful or null and void whereby it contravenes reg. 11 and cl. 29(1) of Schedule H;

(iii) a declaration that D has breached reg. 11(2) of the HDR in taking and/or receiving the booking fee from the plaintiffs; and

(iv) an order for D to pay LAD accrued 36 months from date of payment of the booking fee to date of delivery of vacant possession of the property and completion of common facilities, as specified and stated in the SOC annexures.

[15] The respective property and the claim for LAD of each of the plaintiffs are summarised as follows:

Plaintiff	Property	Claim for LAD
1	B-20-D	RM353,392.22
2	B-40-F	RM530,357.60
3 & 4	A-15-D	RM288,988.93
5 & 6	A-26-E	RM479,033.42
7 & 8	A-17-E	RM461,952.99
9 & 10	A-17-F	RM461,952.99
11 & 12	B-33A-D	RM518,678.14
13 & 14	A-16-B	RM334,320.64
15 & 16	A-20-C & A-20-D	RM397,519.56 & RM587,129.42
17 & 18	B-41-F	RM602,379.62
19 & 20	B-10-F	RM295,238.14
21	A-16-E	RM459,004.27
22	A-15-E	RM458,129.42
23	A-33A-F	RM489,915.62
24	B-27-F & A-39-G	RM608,414.24 & RM639,375.56
25	B-05-C	RM441,336.57
26	B-03-C	RM450,984.33
27	A-06-B	RM337,056.33

Defendant's Case

[16] D contends that it has a meritorious defence and that there are issues in dispute that ought to be tried as follows:

(i) the plaintiffs' action is barred by s. 6 of the Limitation Act 1953;

(ii) the plaintiffs had employed the wrong mode of proceeding;

(iii) the plaintiffs had wrongly filed a class action;

(iv) the plaintiffs had failed to particularise and show actual loss or damage;

(v) the plaintiffs are estopped by settlement letters;

(vi) the plaintiffs have knowledge and consented to the SPA;

(vii) there has been a non-joinder of parties; and

(viii) the plaintiffs would be unjustly enriched.

Decision

[17] It is my finding that D has failed to raise any triable issue. I therefore allowed encl. 47 for summary judgment to be entered against D. My reasons are as follows.

Completion Period In The SPA Cannot Be Varied

[18] The SPA signed between the parties was in the prescribed Schedule H contract of sale. As the SPA is regulated by statute, D cannot deviate or add or vary any of the terms in the said statutory contract. I am guided by the following authorities.

[19] In *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852 the Court of Appeal said (at p. 626, CLJ):

> [8] ... The contract which has fallen for construction in the present cases is a **special contract.** It is **prescribed and regulated by statute.** While parties in normal cases of contract have freedom to make provisions between themselves, a **housing developer does not enjoy such freedom.** Hence, **parties to a contract in Form H cannot contract out of the scheduled form.** Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the **statutory form of contract.**
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> (emphasis added)

[20] In *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232 at p. 236, the Federal Court said:

> [3] Now, cl. 23 is part of a **statute-based contract.** In this country, the relationship between a house-buyer and a licensed developer is governed by the Housing Developers legislation. Its object is to protect house-buyers against developers. A **developer must execute the agreement set out in the schedule** to the relevant subsidiary legislation. He cannot add other clauses in it. (emphasis added)

[21] Finally in *Ang Ming Lee*, the Federal Court said (at pp. 182 to 183, CLJ):

> [40] The Act being a **social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration** against the developer. Parliament has entrusted the Minister to **safeguard the interests of the purchasers** and the Minister has **prescribed the terms and conditions of the contract of sale as per Schedule H.** (emphasis added)

[22] In light of the aforesaid authorities, my opinion is that the SPA must follow the prescribed form in Schedule H, which provides a completion period of 36 months. D is not permitted to change the completion period from 36 months to 54 months.

[23] To my mind, any variation made to the SPA which is inconsistent or contradicts the terms in the Schedule H contract of sale is of no legal effect and does not bind the plaintiffs. It follows that D is required to deliver vacant possession of the property within 36 months (not 54 months) in accordance with Schedule H.

[24] D avers that the EOT was granted by the Controller of Housing ("Controller") which allows a completion period of 54 months. The EOT however, in my view, is null and void. That must be so as *Ang Ming Lee* has held that reg. 11(3) of the HDR, pursuant to which the EOT was granted, is *ultra vires* the HDA. And that the Controller has no power to waive or modify any provision in the Schedule H contract of sale. The Federal Court said (at p. 188, CLJ):

> [60] On the above analysis, **we hold that the Controller has no power to waive or modify any provision in the Schedule H Contract of Sale** because s. 24 of the Act does not confer power on the Minister to make regulations for the purpose of delegating the power to waive or modify the Schedule H Contract of Sale to the Controller And it is not open to us to read into the section an implied power enabling the Minister to do so. **We consequently hold that regulation 11(3) of the Regulations, conferring power on the Controller to waive and modify the terms and conditions of the contract of sale is *ultra vires* the Act.**
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> (emphasis added)

Knowledge And Consent

[25] D sought to distinguish *Ang Ming Lee* from the present case in that:

(i) the extension of time in *Ang Ming Lee* was obtained after the signing of the sale and purchase agreement. Whereas the EOT in the present case was obtained before the signing of the SPA.

(ii) the sale and purchase agreements entered into by the purchasers in *Ang Ming Lee* stipulated 36 months for delivery of vacant possession. Whereas the SPA entered into by the plaintiffs stipulated 54 months for delivery of vacant possession.

(iii) the EOT granted in the present case is reflected in cls. 25 and 27 of the SPA.

(iv) the plaintiffs in *Ang Ming Lee* brought their action *via* a judicial review. Whereas the plaintiffs in the present case initiated the suit *via* a writ.

(v) the EOT was obtained not through reg. 12 (Appeal to the Minister) of the HDR.

[26] D contends that the plaintiffs have knowledge of the 54 months EOT period and consented to the same. And that the plaintiffs did not object to the EOT, even after obtaining vacant possession of the property. The

plaintiffs, on the other hand, aver that they had no knowledge of the EOT as D did not extend a copy of the EOT to them. I note however that the 54 months EOT period is reflected in the SPA signed by the plaintiffs.

[27] In any event, I do not think it makes a difference that the EOT was obtained before signing of the SPA or that the plaintiffs ought to have knowledge of the 54 months EOT period since it is reflected in the SPA. The outcome remains the same. Namely the EOT is unlawful. One cannot waive or consent to illegality.

[28] D complains that the plaintiffs only raised objections to the 54 months EOT period after *Ang Ming Lee*, to unjustly enrich themselves. But I think the plaintiffs are well within their legal rights in invoking *Ang Ming Lee* to advance their cause. After all, the Federal Court went to great lengths to explain that the HDA is a social legislation designed to protect house buyers. And that the interest of house buyers must be the paramount consideration against housing developers. The plaintiffs here are such house buyers who are to be protected.

[29] It is noteworthy that the apex court in *Ang Ming Lee* did not declare its decision to be prospective in effect. Thus, the general principle of retrospective effect applies.

[30] It is a fundamental principle that all judgments of a court are retrospective in effect. (See *Abillah Labo Khan v. PP* [2002] 3 CLJ 521 at p. 527). The exception is if there is a specific direction of prospectivity expressed in the judgment itself. (See *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 at p. 566; [2017] 3 MLJ 561 at p. 600).

[31] It is said that the 'retrospective' effect of a change in the law might potentially have disruptive and seemingly unfair consequences. 'Prospective overruling' is a judicial tool fashioned to mitigate these adverse consequences. It is a practical solution for alleviating the inconveniences which may result from a decision declaring a law to be void. So that previous decisions would remain undisturbed and not be affected.

[32] In the present context, the Federal Court in *Ang Ming Lee* has seen it fit not to express a specific direction of prospectivity in its judgment. As a result, *Ang Ming Lee* has retrospective effect and can be relied upon by the plaintiffs in their claim for LAD.

Non-Joinder Of Parties

[33] D argues that the plaintiffs have failed to join the Minister of Housing and Local Government and the Housing Controller (collectively "Ministry") as parties to the suit, which is improper and an abuse of process. According to D, the plaintiffs *vide* the present action seek a declaration that the EOT

granted by the Ministry is null and void. The plaintiffs must therefore join them as a party herein. Their non-inclusion is fatal as the court is not empowered to make decision affecting the Ministry without affording them an opportunity to be heard.

[34] I disagree. The instant suit challenges the validity of cls. 25 and 27 of the SPA, rather than the decision of the Ministry in granting the EOT. It is already settled that the EOT is null and void in light of *Ang Ming Lee*. It is the contractual breach of cls. 25 and 27 of the SPA which gives rise to D's obligation to pay LAD for failing to deliver the vacant possession as prescribed under the law, as opposed to the administrative decision of the Ministry. In my view, it is not necessary for the plaintiffs to join the Ministry as a party to this suit.

Not Wrong Mode Of Proceeding

[35] D avers that the plaintiffs' action was filed using the wrong mode. The argument is that the plaintiffs are challenging the validity of the EOT, which is a decision granted by the Ministry and therefore within the sphere of public law. Thus, the plaintiffs' action must be by way of judicial review as prescribed under O. 53 of the ROC, and not a writ action.

[36] I disagree. By reason of *Ang Ming Lee*, the EOT is illegal and *void ab initio.* As such, there is no decision to challenge. The fact that the plaintiffs did not quash the EOT by way of a judicial review does not make the EOT legal and valid. The effect of the EOT being void is that there is no decision in the first place. Thus, there is nothing to challenge.

[37] I find support in the Court of Appeal case of *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231 at pp. 239 to 240 which said:

> **Decision** based on examination results as pronounced on 13 September 2001 **which is void is not a decision.** In this regard, it is pertinent to refer to the article by Michael Akehurst in *Public Law* (1982) at p. 619 which states:
>
> > **A void decision is, strictly speaking, not a decision at all and therefore does not need to be revoked.** If a public authority has taken a decision which is void, it is entitled to ignore that decision and to consider the matter again as if the original decision had never existed. In this context, **a decision is regarded as void if it is *ultra vires.*** (emphasis added)

[38] The above *dictum* was approved and applied in *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 8 CLJ 163 at p. 181 where the Federal Court said:

> [75] It was held by the Court of Appeal in *Chan Kwai Chun v. Lembaga Kelayakan* [2002] 3 CLJ 231; [2002] 3 MLJ 550 that a **decision is regarded as void if it is *ultra vires*. A void decision is no decision at all and ought to be disregarded.**

> [76] **Applying the above principle,** the State Authority had acted without jurisdiction when it made the second decision. The second decision is a nullity. It can have **no legal effect.** Consequently, the full implementation of the second decision by the appellant was therefore void.
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> ...
>
> [82] In view of the above, unlike court orders, administrative decisions can be challenged in a collateral proceeding. The above authority also determined that an administrative order which is void "could be disobeyed with impunity **without the need for proceedings to set it aside**". (emphasis added)

[39] My view is that the EOT, being a void administrative decision, is no decision at all. Thus, the EOT can be disregarded without the need for judicial review proceedings to set it aside.

[40] D cited the Federal Court case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. That case however recognised that not every decision made by an authoritative body is suitable for judicial review. The claim in question must contain sufficient public law elements in the decision made by public authorities to the affected persons. The following observation by the Federal Court is instructive:

> [61] We observed that **a challenge on the use of appropriate procedure is very much fact-based.** Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. **If it is a mixture of public and private law then the court must ascertain which of the two is more predominant.** If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But **if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.** (emphasis added)

[41] Indeed I find that the instant suit is one such matter which is under private law though it concerns a public authority ie, the Ministry. It involves a mixture of public and private law, of which I think the latter is more predominant. Whilst the Ministry's decision to grant the EOT has affected the rights of the plaintiffs, at the end of the day, it is the SPA that ultimately encompassed and governed the contractual relationship between the plaintiffs and D. The relief sought by the plaintiffs is derived from the SPA. D is the person directly responsible for the infringement of the plaintiffs' rights and is liable to provide monetary relief of LAD. This, in my view, falls under private law.

[42] Referring to the EOT obtained on 16 December 2010, D says that the plaintiffs have failed to meet the three months' deadline for filing a judicial review application. (See O. 53 r. 3(6) of the ROC). But the SPA were entered into on various dates in 2012 and 2013. It is not possible for the plaintiffs to pursue a judicial review in respect of the validity of the EOT within the said deadline when the impugned cls. 25 and 27 only came to their attention much later in the SPA. As the SPA were signed two to three years after the EOT had been granted, the plaintiffs would not be able to avail themselves of the judicial review process within three months of the impugned decision having been made. The three months' time limit would have lapsed and hence no remedy under O. 53 of the ROC is available to the plaintiffs (unless time is extended by the court). Any judicial review application would likely be met with strenuous objection by D (as did happen here) of limitation of time through no fault of the plaintiffs. It is my finding that the mode of proceeding chosen by the plaintiffs for their claim, ie, by way of writ of summons, is not wrong.

Settlement Letters

[43] D contends that majority of the plaintiffs have already been fully compensated and had all their claims resolved in finality. By virtue of their acceptance of the settlement sums and agreement to waive any and all further claims for LAD arising from the SPA. D refers to the settlement letters signed by the plaintiffs concerned which are exhibited in 'exh. WHY2' of D's affidavit affirmed on 13 August 2021 and filed herein. The said settlement letters provide as follows:

(i) that the plaintiffs waive all their rights to make any claims and/or demands in relation to the SPA;

(ii) that the plaintiffs will release and discharge D from all liabilities in relation to any grievances and further agrees and declares that no further claims or demands whatsoever and no legal proceedings whatsoever shall be instituted against D; and

(iii) that the plaintiffs will keep D fully indemnified against all costs, losses and/or damages which D may incur or suffer and against all actions, proceedings, claims and/or demands.

[44] The plaintiffs aver that the settlement sums are in respect of defect compensation and ought not to be taken into consideration in computing LAD. Moreover, it is evident that the settlement sums were computed based on a completion period of 54 months (not 36 months as required by Schedule H). The settlement letters are confined to LAD calculated from the EOT period of 54 months onwards. The plaintiffs' claim for LAD, however, is premised on a completion period of 36 months. The plaintiffs are claiming for unpaid LAD in respect of the period between the 36th month to the 54th

month of the SPA. The period of delay from the 36th month to the 54th month of the SPA did not factor into the settlement letters. In short, D did not pay the full LAD amount which the plaintiffs are entitled to receive under the law.

[45] I am satisfied that there is no duplicity of LAD claim by the plaintiffs. D has never denied that it did not pay the plaintiffs any LAD in respect of the 54 months EOT period. As such, this is not a situation where the plaintiffs will receive double compensation of LAD pertaining to the same period.

[46] In light of *PJD Regency* (*supra*), it is settled that the LAD is to be calculated commencing from the date of payment of the booking fee. There the Federal Court held (at pp. 475 to 476 (CLJ); pp. 91 to 92 (MLJ)):

> [89] We agree fully with the views expressed above and as such we answer all related leave questions on the common issue to the effect as follows:
>
> > Where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of Scheduled Contracts under Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 (Regulation 1989) enacted pursuant to Section 24 of the Housing Development (Control and Licensing) Act 1966, *the date for calculation of liquidated agreed damages ('LAD') begins from the date of payment of deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase and not from the date of the sale and purchase agreement literally.*
>
> (emphasis added)

Plaintiffs Are Not Estopped From Claiming LAD

[47] It bears repeating that the SPA signed between the parties is a statutory contract regulated by the HDA and the HDR. No deviation from Schedule H is permitted by law. Its object is to protect house buyers. Thus, the plaintiffs (as house buyers) should not be deprived of their statutory entitlement to the full LAD amount under the law. I find support in the following authorities.

[48] In *Encony Development Sdn Bhd v. Robert Geoffrey Gooch & Anor* [2016] 1 CLJ 893, the Court of Appeal explained that the provisions in the Schedule H contract of sale are statutory provisions which have been imposed by law upon the parties. The Court of Appeal said (at p. 906):

> [41] The SPA between the respondents and the appellant, who is a housing developer, is governed by a **statutory form of contract** as prescribed in sch. H of the Housing Development (Control and Licensing) Regulations 1989 [PU(A) 58/1989] ('the regulations'). As such, the **provisions in the SPA are not merely contractual,** but are in effect **statutory provisions,** as they are actually provisions of sch. H of the Regulations, which have been **imposed by law upon the parties.**
>
> (emphasis added)

[49] In *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252, the Court of Appeal agreed that the LAD provision in the SPA cannot be contracted out. The Court of Appeal said (at p. 264):

> [25] ... In this appeal, the respondents took a firm view on the effect of the Housing Development (Control and Licensing) Act 1966 and reg. 11(1) of the Housing Development (Control and Licensing) Regulations 1989, in effect arguing that the **LAD provision in the Schedule G standard form SPA could not be contracted out.**
>
> [26] As a general statement of the position of the law in the context of housing development legislation which exists to **protect the interests of purchasers of housing accommodation and the public at large, the proposition could be agreed.** (emphasis added)

[50] In the present case, the 54 months completion period (as stipulated in the SPA) was in contravention of the 36 months' time-line (as provided in Schedule H). The plaintiffs are statutorily entitled to claim the full LAD amount based on the completion period of 36 months as provided in Schedule H. It is evident that the settlement sums paid by D to the plaintiffs concerned were for a period of delay calculated based on the 54 months EOT period. This is in violation of Schedule H which provides a formula for calculation based on the prescribed timeline of 36 months. That D has not paid the plaintiffs any LAD for the period of delay from the 36th month to the 54th month of the SPA has never been denied by D.

[51] In *Hedgeford Sdn Bhd v. Sri Gananatha Sivanathan & Ors* [2018] 1 LNS 1497, the High Court made the following observation with regard to a settlement sum offered by a developer which is less than what the purchasers were entitled to under the law:

> [134] This case demonstrates why the *position is strict and rigid when it comes to the rights of purchasers under a statutory contract.* Here is a case where there was delay in delivery of vacant possession of the units (clause 25 of the SPA) and in the delivery of common facilities (clause 21 of the SPA) and the plaintiff took it upon themselves, apparently for the sake of convenience, to prepare the *LAD settlement letters, which states the amount that the purchaser is supposed to be entitled to* under the SPA (which has been proven and acknowledged to be *incorrect as it did not factor in the LAD under clause 27 SPA)* without stating how the figure was derived and purporting to state that the amount represents the "amount relates to monies due to me/us pursuant to the terms of the sale and purchase agreement ..." when in fact the *amount due to the purchasers are very much more than what is stated in the LAD settlement letters, which PW1 and PW4 were ignorant of* at the material time.
>
> [135] In those circumstances, even though there was no duress of any sort, and even though the purchasers (D2 to D4) had ample time and could have, but did not check with anyone about their entitlement under

clause 27 of the SPAs, it *cannot be inferred or assumed, merely because they signed on the relevant LAD settlement letters or banked in the cashier's orders, that they had intentionally agreed to forgo their entitlement to LAD* under clause 27 of the SPAs. (emphasis added)

[52] My view is that any purported settlement, which has the effect of diminishing or taking away the statutory rights of a house buyer, is of no legal effect. A housing developer cannot rely on such waiver or estoppel to preclude a house buyer from asserting the full extent of his rights as provided for under the HDA and the HDR. There is no estoppel against statute.

[53] In *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 at p. 179, the Supreme Court said:

On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants **cannot invoke the doctrine of issue estoppel.** There can be **no estoppel as against statutory provisions.** (emphasis added)

[54] In *Powernet Industries Sdn Bhd v. Golden Wheel Credit Sdn Bhd* [2020] 10 CLJ 374 at pp. 392 to 395, the Court of Appeal, dealing with the Moneylenders Act 1951, said:

[68] The jurisprudence on this area of law is quite settled and **there can be no estoppel against statutory provisions.** ...

...

[73] Thus, as a general rule, **there can be no estoppel against a statutory provision** except perhaps where it involves procedural provisions (*Sia Siew Hong* (*supra*)) or does not **involve public interest or social policy. Thus, estoppel cannot operate in respect of a statute which is intended to protect a class of persons,** namely borrowers who borrow from licensed moneylenders.

...

[80] In our view, if waiver is allowed, then it will defeat the operation of s. 16 of the Act or any other provision of the Act and this will open the proverbial floodgates for a court-sanctioned breach of the Act. It is not far-fetched to say that disingenuous and unscrupulous moneylenders will be able to prevail upon desperate borrowers to put it in writing that they (the borrowers) are waiving their rights with respect to the statutory provisions of the Act.

[81] The reality is that desperate borrowers will accede to anything that is asked of them by moneylenders. Because of their dire straits, they will sign anything that is placed before them. Thus, it will take very little to persuade the borrower who will be more than willing to sign away his rights as provided for under the Act. Therein lies the obvious mischief or danger. And, it is because of this danger, that we are impelled to the view that **there can be no waiver/estoppel against the provisions of the Act,** which was enacted pre-eminently to regulate the business of moneylending and to protect the borrowers.

(emphasis added)

A [82] It is relevant in this context to note that a **party may not contract out of the protection which Parliament had intended that they should have.**

[55] In *Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [1999] 2 CLJ 1023; [1999] 3 MLJ 157 at p. 1053 (CLJ); pp. 185 to
B 186 (MLJ), the Court of Appeal said:

> The authorities are unanimous upon the proposition that whether it is permissible for a litigant to waive or contract out of the provisions of a written law depends upon the language of the particular statute. And where the language is unclear, it depends upon the purpose of the statute
C and upon whether its overall purpose would be defeated by permitting a waiver or contracting out. ...
>
> > ... Although there is a general principle that a person may waive any right conferred on him by statute ... difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation,
> D *public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.*
> (emphasis added)

E **[56]** In the present context, the HDA (and its subsidiary legislation the HDR) are a social legislation enacted with the purpose to protect house buyers. Thus, the law on waiver or estoppel cannot operate against the HDA and the HDR. If waiver or estoppel is allowed to operate, it will defeat the object and purpose of the HDA and the HDR.

F **[57]** It is a truism that there is an inequality of bargaining power between developers and house buyers. It is conceivable that in some cases, a developer might not disclose to a house buyer, his or her full entitlement to claim for LAD under the law. In such instance, it may not take very much for a developer to persuade a house buyer to sign away his or her statutory
G rights under the HDA and the HDR. I therefore think there can be no waiver or estoppel against the HDA and the HDR.

[58] My conclusion is that D cannot be allowed to rely on any waiver or estoppel to preclude the plaintiffs from asserting their statutory rights to claim for full LAD pursuant to Schedule H based on the completion period
H of 36 months (instead of 54 months).

No Unjust Enrichment

[59] D complains that the plaintiffs are attempting to unjustly enrich themselves. First, by claiming for an additional 18 months of LAD (ie, from
I the 36th month to the 54th month of the SPA) more than seven years after

agreeing to the 54 months EOT period. Second, by claiming for an additional 18 months of LAD after accepting the sums paid by D under the settlement letters.

[60] My answer is this. The HDA and the HDR are social legislations enacted to protect house buyers. Therefore, neither unjust enrichment nor waiver nor estoppel can be relied upon by D to prevent the plaintiffs from claiming what they are statutorily entitled to claim premised on the prescribed Schedule H contract of sale. Otherwise, the intent of Parliament to protect house buyers would be defeated.

[61] In my view, there is no issue of unjust enrichment or waiver or estoppel as the HDA and the HDR are social legislations. As mentioned earlier, *PJD Regency* (*supra*) held that the calculation of LAD begins from the date of payment of the booking fee, and not from the date of the statutory sale and purchase agreement. The Federal Court explained that this point is further cemented by the nature of the HDA and the HDR being social legislations. The Federal Court said:

> [1] The phrase "social legislation" attached to the Housing Development (Control and Licensing) Act 1966 ("HDA 1966") and its ensuing subsidiary legislation ie, the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989") is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the **approach taken by the courts to tip the scales of justice in favour of the home buyers** given the **disparity in bargaining power between them and the housing developers.**
>
> ...
>
> [27] **That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute.** ...
>
> ...
>
> [31] ... A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of **regulating the relationship between a weaker class of persons and a stronger class of persons.** Given that one side always has the upper hand against the other due to the **inequality of bargaining power,** the State is compelled to intervene to balance the scales of justice by providing certain **statutory safeguards for that weaker class.** ...
>
> ...
>
> [33] ... When it comes to interpreting social legislations, the State having statutorily intervened, the courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the Legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.

A ...

[124] ... The **concept behind LAD is to compensate a purchaser for the developer's failure to comply with the statutorily prescribed timeline.** ...

[125] The **LAD prescribed by law is a statutory remedy** afforded to the purchasers. **There can therefore be no question of unjust enrichment upon**
B **an innocent party's right to enforce his statutory remedy against the party in breach.** ...

[126] We therefore **answer the question of whether the award of the Housing Tribunal results in the purchasers being unjustly enriched in the negative.** (emphasis added)

C **[62]** I note the explicit statement by the Federal Court that the LAD prescribed by law (in this case, the HDA and the HDR) is a statutory remedy afforded to purchasers. And therefore there can be no question of unjust enrichment upon a purchaser's right to enforce his statutory remedy against the housing developer. I readily embrace that statement. I therefore conclude
D that there is no question of unjust enrichment on the part of the plaintiffs in claiming LAD.

Plaintiffs' Claim Is Not Barred By Limitation

[63] D avers that the plaintiffs' claim is barred by the limitation period
E stipulated in s. 6(1)(a) of the Limitation Act 1953 which reads:

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of **six years** from the **date on which the cause of action accrued,** that is to say:

(a) actions founded on a contract or on tort;

F **[64]** D contends that the plaintiffs' cause of action, which is founded on a contract, arises from the SPA that is entered into between the parties. Since the dates of the SPA range from 2012 to 2013, the six years' limitation would have set in as early as 2018 or latest by 2019. As the SOC was filed on 10 August 2020, there was a delay of about one to two years in pursuing the
G action. The plaintiffs have failed to plead or show why the limitation period ought to be extended by virtue of Part III of the Limitation Act 1953 (which allows extension or postponement of limitation period in certain circumstances).

H **[65]** I disagree. In my opinion, the plaintiffs' right to claim for LAD only arose on the date they took delivery of vacant possession of the property. Or if D had failed to deliver vacant possession (which is not the case here), then on the date that the delivery of vacant possession falls due. Because that is the time when D must pay the LAD, if any. This is stipulated in cl. 25(2) of the SPA which reads:

I

> Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Parcel.

[66] Further, this is made clear in cl. 25(3) of the SPA which reads:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

[67] In the instant case, the plaintiffs took or are deemed to have taken delivery of vacant possession of the property on various dates in early 2017 (January or February 2017). Thus, the plaintiffs' cause of action to claim for LAD accrued on those dates. The six years limitation period will only expire in early 2023 (January or February 2023). The present suit was filed on 10 August 2020, which is well within the limitation period. It is therefore my finding that the plaintiffs' claim is not barred by limitation.

[68] I am guided by the Federal Court case of *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188 which held that the purchaser's right to damages accrued on the day after the time-limited for delivery of vacant possession. The Federal Court said (at p. 763 (CLJ); p. 197 (MLJ)):

> It follows, therefore, that our answer to the crucial question aforesaid is: because the agreement by cl. 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quern* (the closing date). The *purchaser's right to an action for damages for breach of contract – following the general rule – accrued on the date of the breach of contract which, in this case, was the day after the time-limited under cl. 18(2) for delivery of vacant possession,* that is to say, on 12 December 1986. (emphasis added)

[69] Also *Sentul Raya* (*supra*) where the Court of Appeal said (at p. 629, CLJ):

> [16] In our judgment this part of the case is inextricably intertwined with the s. 56 argument which has already been dealt with earlier in this judgment. The answer once again lies in cl. 22(2) of the statutory contract. **Once the date for delivery of vacant possession passed, the appellant's liability to pay liquidated damages calculated in accordance with the formula provided became immediate.** No question of time being at large therefore arises. Accordingly, s. 47 of the Contracts Act 1950 has no application to the present case. (emphasis added)

Not Necessary For Plaintiffs To Particularise Or Show Actual Loss

[70] D contends that the plaintiffs have failed to particularise any loss that they have suffered. And this is in breach of O. 18 r. 12 of the ROC. Further, to claim LAD, the plaintiffs must prove actual loss or reasonable compensation. I disagree.

[71] As pointed out by the Court of Appeal in *Sentul Raya* (*supra*), the SPA is a 'special contract'. It is not an ordinary contract of sale but a statutory contract which is 'prescribed and regulated by statute'. The Court of Appeal held that the LAD formula in the SPA is prescribed by law. As such, there is no need for a purchaser to prove his loss. The Court of Appeal said (at p. 628):

> [14] The third ground raised by the appellant is that the respondents are under a duty to prove the damages, if any that they have suffered. This they have not done, and their claims should therefore be disallowed. A short answer to this submission is to be found in cl. 22(2) itself. **The damages are liquidated and calculated in accordance with the formula prescribed by the clause. No further onus lies** upon the respondents in the appeals before us. (emphasis added)

[72] In the present case, the formula for calculation of LAD is set out in cls. 25(2) and 27(2) of the SPA. The plaintiffs' claim for LAD is in accordance with the prescribed formula. There is no further onus on the plaintiffs to prove damages.

[73] D refers to s. 75 of the Contracts Act 1950 and the Federal Court case of *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817. To argue that the plaintiffs must prove actual damages or reasonable compensation when making a claim for LAD. However, I note that the Federal Court in *Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 1 AMR 737; [2018] MLJU 1935 has reviewed, if not departed from, *Selva Kumar* (*supra*).

[74] In *Cubic Electronics* (*supra*), the Federal Court said (at p. 750, CLJ):

> [64] *... does this then mean that for every case where the innocent party seeks to enforce a clause governing the consequences of breach of a primary obligation, it invariably has to prove its actual loss or damage? Selva Kumar (supra)* and *Johor Coastal (supra) seem to answer in the affirmative,* unless the case falls under the limited situation where it is difficult to assess actual damage or loss.
>
> [65] With respect and for reasons we shall set out below, *we are of the view that there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. Selva Kumar (supra)* and *Johor Coastal (supra) should not be interpreted* (as what the subsequent decisions since then have done) *as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation.* Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point. (emphasis added)

[75] The Federal Court went on to revisit or restate the principles of law on damages clause as follows (at pp. 752 to 753, CLJ):

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(iv) In determining what amounts to "reasonable compensation" under s. 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish* (*supra*) are relevant.

(v) A *sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable* in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

(vi) Section 75 of the Act *allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven.* Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.

(vii) The initial onus lies on the party seeking to enforce a damages clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the *innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein,* if any.

(viii) If there is a dispute as to what constitutes reasonable compensation, the *burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.*

(emphasis added)

[76] In the instant suit, the LAD formula in the SPA is prescribed by law. As such, no further onus lies on the plaintiffs to prove damages. Even if that was not so, applying *Cubic Electronics* (*supra*) to the present case, my finding is as follows:

(i) Reasonable compensation may be awarded to the plaintiffs irrespective of whether actual loss is proven.

(ii) In seeking to enforce the LAD clause under the SPA, the plaintiffs have successfully adduced evidence that:

(a) there was a breach of the SPA, ie, in relation to late delivery of vacant possession of the property; and

(b) the SPA contains a clause specifying a sum to be paid upon breach, ie, cls. 25(2) and 27(2) of the SPA.

(iii) As those two elements have been established, the plaintiffs are entitled to receive a sum not exceeding the LAD amount stipulated in the SPA, irrespective of whether actual damage is proven. Subject always to D proving the unreasonableness of the LAD clause.

(iv) Since D disputes the reasonable compensation payable to the plaintiffs, the burden of proof falls on D to show that the LAD clause is unreasonable. Which D has failed to do.

Not A Class Action

[77] D avers that the plaintiffs have wrongly filed a class action. (See O. 15 r. 12 of the ROC). I disagree. All 27 plaintiffs were individually named in the statement of claim. Their respective details and claims were particularised in the SOC annexures. Nowhere in the statement of claim is there any indication that the present suit was instituted as a representative action. There is no endorsement of representative capacity in the writ. (See O. 6 r. 2(1)(b) of the ROC). Instead, all 27 plaintiffs are stated in the title or intitulement of the writ and the statement of claim. The details of their respective property, booking fee date and amount, SPA date and price, vacant possession delivery date and LAD claim amount are particularised in the SOC annexures. Clearly, this is not a class action nor was it wrongly filed as one.

[78] Next, D submits that the plaintiffs should have filed separate actions at the subordinate courts instead of instituting this suit in the High Court. That the plaintiffs have abused the court's process in an attempt to avoid the filing fees and costs required to be paid for each action to be commenced separately. In response, the plaintiffs referred to O. 15 r. 4 which reads:

Joinder of parties (O. 15 r. 4)

(1) Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where:

(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and

(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

[79] According to the plaintiffs, their respective SPA bore the same terms and conditions as each other except for the purchase price, unit number and the date of the SPA. The reliefs claimed by each of them are in respect of a similar transaction. The issues that exist in their respective claims arose from the same question of law. Thus, their respective claims can be expediently dealt with in the same proceeding. I agree and see no abuse of process in this respect.

Defendant Has Breached Reg. 11(2) Of HDR

[80] I agree with the plaintiffs that in collecting the booking fee from them, D has breached reg. 11(2) of the HDR which reads:

> (2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

[81] In *Sri Damansara Sdn Bhd v. Voon Kuan Chien & Anor* [2020] 5 CLJ 619; [2020] 4 MLJ 265, the Court of Appeal said at pp. 628 to 629 (CLJ); pp. 275 to 276 (MLJ):

> [28] Regulation 11(2) of the Regulations prohibits the collection of any prior payment before the signing of the SPA as follows:
>
> > No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale
>
> Thus to allow a collection of a deposit of less than 10% of the purchase price before the signing of the SPA, pejoratively called **a booking fee, would be repugnant to the whole purpose of the HDA** and the Regulations.
>
> ...
>
> [30] To allow the collection of a booking fee under the scheme of payment under the Third Schedule to the Schedule H SPA would be to permit what is expressly prohibited by reg. 11(2) of the Regulations with the effect that the protection afforded to a purchaser under the scheme of installment payment of purchase price can be circumvented in the SPA being signed away after the payment of the booking fee.
>
> (emphasis added)

[82] D, as a housing developer, is prohibited from collecting any payment prior to signing of the SPA. That they had done so, however, does not render the SPA illegal. The Federal Court in *PJD Regency* (*supra*) said at pp. 465 to 466 and 484 (CLJ); pp. 82 to 83 and 100 (MLJ):

> [51] It is abundantly clear at this stage that the **developers who collect booking fees do so in express contravention of reg 11(2)** of the HDR 1989. Without prejudging the matter, it is possible for any reasonable person to conclude that the developers have committed an offence under reg. 13(1) of the HDR 1989. Further; solicitors or anyone else who have collected the fees as stakeholders or who have advised or encouraged the developers to do so have similarly committed an offence under reg. 13(3).
>
> ...
>
> [55] Looking at the transactions herein holistically, we **do not consider the agreements to be *ex facie* illegal as they are based on statutory contracts.** There is no question of the scheduled contracts in this case being forbidden by law or that they are of such a nature that, if permitted, would

A defeat any law because they are themselves prescribed by law. What we have here is an instance whereby one party to the contracts namely the developers, have committed an illegal act in securing the contracts. Thus, it is not the contracts *per se* that are illegal rather it is their performance which has violated the strict terms of reg. 11(2) of the HDR 1989 and the Schedules to the scheduled contracts.

B ...

[130] The courts will not countenance the bypassing of statutory safeguards meant to protect the purchasers. To that extent, where the developers act in contravention of the law, they have to accept the resulting consequences.

C [131] While the developers might think that it is a standard commercial practice to accept booking fees, the development of the law clearly suggests to the contrary. The courts will not condone such a practice until and unless the law says otherwise. (emphasis added)

D *Plaintiffs' Claim Is Within The SPA*

[83] D argues that the plaintiffs cannot make a claim based on something that is not within or is outside the scope of the SPA. The plaintiffs have no right to claim LAD outside the scope of the SPA as the 36 months is nowhere to be found in the SPA. There is no concluded contract in respect of 36 E months for delivery of vacant possession of the property.

[84] This argument is misconceived. The plaintiffs are not seeking to contradict, vary, add to or subtract from the terms of the SPA. They are simply saying that the variation of 36 months to 54 months in the SPA is invalid. The plaintiffs are therefore claiming LAD on the premise that the F LAD ought to be calculated based on 36 months, in line with the Schedule H contract of sale.

[85] Clearly, the court has the power to grant the declarations sought by the plaintiffs in an O. 14 application *vide* encl. 47. I refer to the Supreme Court case of *Avel Consultants Sdn Bhd & Anor v. Mohd Zain Yusof & Ors* [1985] 2 G CLJ 11; [1985] CLJ (Rep) 37; [1985] 2 MLJ 209, where a declaration was allowed on an O. 14 application. In *Avel Consultants* (*supra*), the plaintiffs sued the defendants for breach of fiduciary duties and prayed for the following declaration:

H the defendants be **declared** that they were trustees for Avel and Emlec in respect of all professional charges received by them and/or their firm Perunding AJZ from 30 November 1983 up to 1 March 1984.
(emphasis added)

[86] The plaintiffs in that case applied for summary judgment. The court below refused the application. In allowing the appeal, the Supreme Court I said at pp. 39 to 40 (CLJ); p. 211 (MLJ):

... the case under appeal deals with a claim for account and unliquidated damages. It is his **submission**, therefore, that once a breach of fiduciary duties is proved and there is no defence to this issue, the **Court under O. 14 application should give the declaratory judgment asked for** and leave the question of assessment of damages and rendering of accounts to be dealt with by the Registrar.

We are of the opinion that this submission is well-founded. ...

...

The order which emanates from this judgment is that:

(a) **judgment is entered in favour of the appellants on their claim that the respondents had acted in breach of their fiduciary duties**;

(emphasis added)

[87] Lastly, D points to numerous suits filed by other purchasers against D and other housing developers based on similar facts and arguments. D highlighted certain conflicting High Court decisions. However, with all due deference, I am not bound by the said decisions.

Conclusion

[88] For the reasons above, I allowed the plaintiffs' application for summary judgment *vide* encl. 47. I granted the declarations sought by the plaintiffs and entered judgment against D. I awarded interest on the judgment sums at the rate of 5% per annum from the date of judgment to the date of payment. I ordered D to pay costs of RM2,500 to the plaintiffs.